

To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN MARIANA ISLANDS**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY P. VILLAGOMEZ,
JOAQUINA V. SANTOS, and JAMES
A. SANTOS,

Defendants.

Criminal Case No. 08-00020

**MEMORANDUM OPINION AND
ORDER REGARDING
DEFENDANTS' MOTION TO
SETTLE RECORD**

This case is before the court on the defendants' July 23, 2010, Motion To Settle Differences Re: Relevant District Court Order(s) And Events And To Conform Record Accordingly (Motion To Settle Record) (docket no. 405). In their Motion, the defendants assert that the present record does not reflect that members of the public were entirely excluded from jury selection. In support of that contention, they offer eight affidavits, more than a year after the fact. One of the affidavits is from a court security officer averring that the court had instructed him that only attorneys, defendants, and prospective jurors were allowed in the courtroom during jury selection. The other seven are from members of the families of either the defendants or the defendants' trial attorneys, averring that they and other members of the public were excluded from jury selection and were told that only attorneys, defendants, and prospective jurors were allowed to enter the courtroom. Pursuant to Rule 10(e)(1) of the Federal Rules of Appellate Procedure, the defendants ask that the court (1) consider the declarations accompanying their motion; (2) permit further briefing and conduct further proceedings as appropriate to determine

what truly occurred in the district court insofar as the question of public exclusion from the jury voir dire is concerned; and (3) conform the record accordingly.

By Order (docket no. 406) dated July 26, 2010, the court directed the prosecution to file an expedited response to the defendants' Motion To Correct Record by August 2, 2010. The prosecution filed its Opposition To Motion To Correct Record (docket no. 407) on August 1, 2010. The prosecution argues that Rule 10(e) does not allow the relief sought, because the defendants seek to build a new record and rewrite what happened in the trial court, not resolve differences in the existing record. They also assert that the defendants' request is "moot," because the defendants seek to raise for the first time on appeal an issue that requires development of additional facts.

This matter is now fully submitted.

Rule 10(e) of the Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

FED. R. APP. P. 10(e)(1). "The rule does not require the district court to hold an evidentiary hearing, only that it consider and settle the dispute." *United States v. Brika*, 416 F.3d 514, 530 (6th Cir. 2005). Here, the court finds that no hearing is required, because Rule 10(e)(1) is inapplicable.

The Ninth Circuit Court of Appeals has observed, "The district court may not use Federal Rule of Appellate Procedure 10(e) to supplement the record with material not introduced or with findings not made." *United States v. Garcia*, 997 F.2d 1273, 1278 (9th

Cir. 1993). Similarly, the Seventh Circuit Court of Appeals has explained that “[t]his rule is meant to ensure that the record reflects what really happened in the district court, but ‘not to enable the losing party to add new material to the record in order to collaterally attack the trial court’s judgment.’” *United States v. Banks*, 405 F.3d 559, 567 (7th Cir. 2005) (quoting *United States v. Elizalde-Adame*, 262 F.3d 637, 641 (7th Cir. 2001)).

In *Garcia*, the Ninth Circuit Court of Appeals concluded that the district court had properly supplemented the appellate record with a written order on the defendant’s motion to suppress that conformed to its telephonic denial of the defendant’s motion to suppress in light of its failure to enter a written order at the time. *Id.* at 1278-79. In contrast, the court cited several cases properly denying attempts to supplement the record, each of which involved an attempt to add new evidence to the record. *See id.* at 1278 (citing the following cases: *United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979) (affidavits not in original record disallowed); *Shew v. Brownell*, 219 F.2d 301, 302 (9th Cir. 1955) (new findings correcting court’s original erroneous statement of the burden of proof disallowed); *see also United States v. Hillsberg*, 812 F.2d 328, 336 (7th Cir.) (affirming district court’s decision to exclude an affidavit offered under Rule 10(e) that undermined the jury’s verdict), *cert. denied*, 481 U.S. 1041 (1987)). The evidence that the defendants here seek to insert into the record is nothing like a written order that conformed to a previous oral order; it is, instead, entirely new evidence.

As the prosecution suggests, the present Motion To Settle Record is much like the one denied in *Hillsberg*, which the court in *Garcia* cited as an example of the proper denial of a Rule 10(e) motion. In *Hillsberg*, in a motion made four months after trial, the defendant sought to add to the record on appeal an affidavit of his trial counsel, in which counsel recounted a conversation with one of the jurors after the trial indicating that she and another juror did not believe that Hillsberg had the requisite intent for the charged

offense, but that they had acquiesced in the decision of the panel, and that all of the jurors wanted to hear a psychiatrist's answer to an excluded question. *Hillsberg*, 812 F.2d at 336. The Seventh Circuit Court of Appeals noted, "The purpose of Rule 10(e) is to ensure that the court on appeal has a complete record of the proceedings leading to the ruling appealed from, not to facilitate collateral attacks on the verdict." *Id.* The appellate court affirmed the trial court's ruling that "'While the rule allows the district court to correct omissions and misstatements in the record, it does not allow the court to add to the record on appeal matters that might have been but were not placed before it in the course of the proceedings leading to the judgment under review.'" *Id.* The defendants here also attempt to inject into the record new material to facilitate a collateral attack on the verdict. *Id.*; accord *Banks*, 405 F.3d at 567 ("This rule is meant to ensure that the record reflects what really happened in the district court, but 'not to enable the losing party to add new material to the record in order to collaterally attack the trial court's judgment.'" (quoting *Elizalde-Adame*, 262 F.3d at 641)). Rule 10(e)(1) is simply inapplicable to the new evidence that the defendants seek to inject into the record.

Moreover, if a total exclusion of the public occurred during jury selection in the defendants' criminal trial on or about March 30, 2009, the defendants and their trial counsel knew or should have known of that total exclusion when it purportedly occurred. This is so, because the affiants that the defendants have now assembled, who allege that they were excluded from the courtroom during jury selection, include family members of the defendants and the wife of one of the defense attorneys who was assisting her husband in this case. Moreover, the defendants have pointed to absolutely nothing in the existing record that gives the merest hint that the court ordered the total exclusion of the public from jury selection or that the defendants ever objected to a total exclusion of members of the public from jury selection at the time that the exclusion purportedly occurred. The

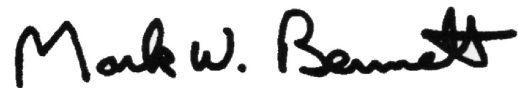
record shows that during jury selection, and again in the course of trial, on the record, defense counsel objected to the court's refusal to release for use by the general public seats reserved for visiting students, but never asserted that all members of the public were being excluded from jury selection at the trial judge's direction. The claim of a total exclusion was asserted for the first time on April 14, 2010, more than a year after the trial, at oral arguments on the defendants' March 2, 2010, motion for bail pending appeal, but that motion had been based on a different claim of violation of the right to a public trial, arising from the trial judge's refusal to open to the general public unoccupied seats in the courtroom reserved for visiting students. Even then, however, the defendants did not request leave to brief the total exclusion claim or to present evidence in support of it.

Under these circumstances, it is difficult to give much credence to the defendants' eleventh hour contention that the public was totally excluded from jury selection. At the very least, the defendants either knew or should have known *at the time of trial* of the issue on which they now seek supplementation of the trial record, and could have made a record on the issue, which warrants denial of their Rule 10(e) motion.. *Hillsberg*, 812 F.2d at 336 (affirming the district court's ruling that Rule 10(e) "'does not allow the court to add to the record on appeal matters that might have been but were not placed before it in the course of the proceedings leading to the judgment under review'"); *see also Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981) (denying, on reconsideration, the defendant's motion to supplement the record pursuant to Rule 10(e), where the defendant knew prior to trial of the existence of the grand jury testimony he sought to add to the record on appeal, and that testimony was Jencks Act material, but the defendant did not request it, and the defendant knew of and had access to at the time of trial taped conversations that he sought to add to the record on appeal, but he did not introduce them into evidence at trial).

THEREFORE, the defendants' July 23, 2010, Motion To Settle Differences Re: Relevant District Court Order(s) And Events And To Conform Record Accordingly (Motion To Settle Record) (docket no. 405) is **denied**. The oral arguments on the defendants' motion, scheduled for August 19, 2010, at 8:00 a.m., are **canceled**.

IT IS SO ORDERED.

DATED this 6th day of August, 2010.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive, slightly stylized font. The "M" is large and loops around the "a". The "W" is formed with two distinct loops. The "Bennett" part is also cursive, with the "t" having a long, sweeping tail that extends to the right.

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA
VISITING JUDGE